

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 16-2321-cv

Caption [use short title]

Motion for: Amici Curiae Copyright Law Scholars to
Participate in Oral Argument on Appeal

Capitol Records, LLC, et al.
Plaintiffs/Appellees

-VS.-

Set forth below precise, complete statement of relief sought:

Amici Curiae Copyright Law Scholars move to
request participation in oral argument before this
Court on appeal.

ReDigi, Inc., et al.
Defendants/Appellants

MOVING PARTY: Amici Curiae in Support of Appellant

☐ Plaintiff ☐ Defendant
☐ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: Appellees Capitol Records, et al.

MOVING ATTORNEY: Jason M. Schultz

[name of attorney, with firm, address, phone number and e-mail]

OPPOSING ATTORNEY: Richard S. Mandel

NYU Technology Law and Policy Clinic

245 Sullivan St. #609, New York, NY 10012

(212) 998-XX;

Cowan Liebowitz & Latman

114 W. 47th St., New York, NY 10036

(212) 790-9291; rsm@cjl.com

Court-Judge/Agency appealed from: Hon. Richard J. Sullivan (U.S. Dist. Ct. Southern District of New York)

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):

☒ Yes ☐ No (explain):

Opposing counsel's position on motion:

☐ Unopposed ☒ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:

☐ Yes ☐ No ☒ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND
INJUNCTIONS PENDING APPEAL:

Has request for relief been made below?

☐ Yes ☐ No
☐ Yes ☐ No

Has this relief been previously sought in this Court?

Requested return date and explanation of emergency:

Is oral argument on motion requested?

☒ Yes ☐ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set?

☐ Yes ☒ No If yes, enter date:

Signature of Moving Attorney:

Date: 06/02/2017

Service by: ☒ CM/ECF

☐ Other [Attach proof of service]

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Capitol Records, LLC, Capitol Christian Music
Group, Inc., Virgin Records IR Holdings, Inc.,

Plaintiffs-Appellees,

-v.-

ReDigi Inc., John Ossenmacher, Larry Rudolph,
AKA Lawrence S. Rogel

Defendants-Appellants.

Docket No. 16-2321-cv

**NOTICE OF MOTION OF *AMICI CURIAE* COPYRIGHT LAW SCHOLARS TO
PARTICIPATE IN ORAL ARGUMENT ON APPEAL**

NOTICE IS HEREBY GIVEN THAT based on the accompanying papers, *Amici Curiae* Copyright Law Scholars (“Copyright Scholar Amici”) respectfully request that this Court grant permission under Fed. R. App. P. 29(g) to participate in oral argument on time ceded by Defendants-Appellants ReDigi, Inc., John Ossenmacher, and Larry Rudolph AKA Lawrence S. Rogel.

Respectfully submitted,

Dated: June 2, 2017

/s/ Jason Schultz

Jason M. Schultz

Counsel for Amici Curiae

NYU Technology Law & Policy Clinic

NYU School of Law

245 Sullivan St. #609

New York, NY 10012

(212) 992-7365

jason.schultz@exchange.law.nyu.edu

CERTIFICATE OF SERVICE

I hereby certify, that on June 1, 2017, a true and correct copy of the foregoing Notice of Motion of *Amici Curiae* Copyright Law Scholars to Participate in Oral Argument on Appeal was served on all counsel of record in this appeal via CM/ECF pursuant to Second Circuit Rule 25.1(h)(1)-(2).

Dated: June 2, 2017

/s/ Jason M. Schultz

Jason M. Schultz

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Capitol Records, LLC, Capitol Christian Music
Group, Inc., Virgin Records IR Holdings, Inc.,

Plaintiffs-Appellees,

-v.-

ReDigi Inc., John Ossenmacher, Larry Rudolph,
AKA Lawrence S. Rogel

Defendants-Appellants.

Docket No. 16-2321-cv

**MOTION OF *AMICI CURIAE* COPYRIGHT LAW SCHOLARS TO
PARTICIPATE IN ORAL ARGUMENT ON APPEAL**

Amici Curiae Copyright Law Scholars (“Copyright Scholar Amici”) respectfully request that this Court grant permission under Fed. R. App. P. 29(g) to participate in oral argument on time ceded by Defendants-Appellants ReDigi, Inc., John Ossenmacher, and Larry Rudolph AKA Lawrence S. Rogel.

In support of this motion, Copyright Scholar Amici state:

1. Copyright Scholar Amici are 24 experts with decades of experience in the field of copyright law, a subject about which *amici* have collectively written more than one hundred articles.
2. This case involves the question of whether a “digital music file, lawfully made and purchased, may be resold by its owner through ReDigi.” *Capitol Records, LLC v. ReDigi, Inc.*, 934 F. Supp. 2d 640, 648 (S.D.N.Y. 2013).
3. Because resolution of this question affects the development of copyright law and policy

regarding first sale rights and fair use, as well as its affect on millions of consumers, movants filed a brief as *amicus curiae* on February 14, 2017 to offer their expertise and guidance to the Court. *See* (Dkt. No. 90) (“Copyright Scholars Amicus Brief”).

4. In Appellants’ Motion to Expedite Oral Argument on Appeal, at 7 (Dkt. No. 108), which was granted by this Court on May 18, 2017 (Dkt. No. 136), Appellants cite the Copyright Scholars Amicus Brief for two key propositions:

- a. First, Appellants cite Copyright Scholars Amici’s observation that Section 109 of the Copyright Act is “unique among the many limitations on the rights of copyright holders in the Copyright Act” because “[e]very other limitation defines uses that are simply not an infringement of copyright, but § 109(a) defines an affirmative *entitlement*.” *Appellants Motion to Expedite Oral Argument on Appeal* at 7, fn. 2 (Dkt. No. 108) (emphasis in original).
- b. Second, Appellants cite Copyright Scholars Amici’s analysis of the ways in which the “district court’s interpretation of Section 109 leads to absurd results, conflicts with Legislative History, and contradicts itself.” *Appellants Motion to Expedite Oral Argument on Appeal* at 7 (Dkt. No. 108)

On appeal, this Court will be presented with the opportunity to engage with both propositions in clarifying the scope of the first sale right.

5. Appellants are not the only party that cite Copyright Scholars Amici in their papers. Appellees and every *amici curiae* in support of Appellees also extensively cite and reference the Copyright Scholars Amicus Brief:

- a. Appellees cite to the Copyright Scholars Amicus Brief more than half a dozen times. *Brief for Plaintiffs-Appellees* at 36, 37, 49, 51, 53, 55, 56 (Dkt. No. 110).

Appellees specifically note that “Only the Copyright Law Scholars *amici* addresses all four §107 factors expressly.” *Brief for Plaintiffs-Appellees Capitol Christian Music Group, Inc., Capitol Records, LLC, and Virgin Records IR Holdings, Inc.* at 49 (Dkt No. 110) (emphasis added).

- b. The briefs submitted on behalf of the Association of American Publishers, the Copyright Alliance, and Motion Picture Association of America and Record Industry Association of America—collectively *amici curiae* in support of Appellees—expressly cite the Copyright Scholars Amicus Brief two dozen times. *Brief of Amicus Curiae Association of American Publishers, Inc. in Support of Plaintiffs-Appellees* at 4, 10, 12, 13, 14 (Dkt No.123); *Brief for Amicus Curiae the Copyright Alliance in Support of Plaintiffs-Appellees* at 7, 8, 10, 12, 17, 23-24, 26-29 (Dkt. No. 124); *Brief of Amici Curiae the Motion Picture Association of America (MPAA) and Record Industry Association of America (RIAA) in Support of Appellees and Affirmance* at 9 (Dkt. No. 131).
- c. The briefs submitted by *amici curiae* in support of Appellants reference or discuss arguments advanced by Copyright Scholars Amici an additional 24 times. *Brief of Amicus Curiae Association of American Publishers, Inc. in Support of Plaintiffs-Appellees* at 7, 18 (Dkt No.123); *Brief for Amicus Curiae the Copyright Alliance in Support of Plaintiffs-Appellees* at 2-6, 9-10, 13, 16-18, 20-21, 23-24, 28, 30 (Dkt. No. 124); *Brief of Amici Curiae the Motion Picture Association of America (MPAA) and Record Industry Association of America (RIAA) in Support of Appellees and Affirmance* at 4-5, 15-16, 21 (Dkt. No. 131).

6. Given Copyright Scholars Amici collective expertise, coupled with both parties' reliance on and reference to arguments advanced in the Copyright Scholars Amicus Brief, Copyright Scholars Amici submit that their participation in oral argument would assist the Court in consideration of the important questions of copyright law presented on appeal.

7. Appellant have consented to Copyright Scholars Amici participating in oral argument; Appellees have opposed participation. However, given that the briefs of Appellees, as well as Appellants and *amici curiae* in support of Appellants, cite and reference the arguments raised by Copyright Scholars Amici, granting this Motion would not prejudice Appellants or their *amici curiae*.

For these reasons, Copyright Scholars Amici respectfully request the Court to grant this Motion to participate in oral argument.

Respectfully submitted,

Dated: June 2, 2017

/s/ Jason Schultz
Jason M. Schultz
Counsel for Amici Curiae
NYU Technology Law & Policy Clinic
NYU School of Law
245 Sullivan St. #609
New York, NY 10012
(212) 992-7365
jason.schultz@exchange.law.nyu.edu

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Capitol Records, LLC, Capitol Christian : Music
Group, Inc., Virgin Records IR : Holdings, Inc.,

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-v.-

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AKA Lawrence S. Rogel

Defendants-Appellants.

Docket No. 16-2321-cv

**DECLARATION OF JASON M. SCHULTZ IN SUPPORT OF
AMICI CURIAE COPYRIGHT LAW SCHOLARS' MOTION TO APPEAR FOR
ORAL ARGUMENT ON APPEAL**

Jason M. Schultz declares and states as follows:

1. I am an attorney admitted to practice before this Court and the Director of the NYU Technology Law and Policy Clinic, counsel of record for *amici curiae* Copyright Law Scholars ("Copyright Scholars Amici"). All information provided in this declaration is based on my own personal knowledge.
2. On May 17, 2017, I communicated with Robert Welch, counsel for Appellants, by email. He represented that his clients had no objection to Copyright Scholars Amici seeking oral argument or to this Motion. He also agreed to cede a portion of Appellants' time to Copyright Scholars Amici for oral argument such that participation by Copyright Scholars Amici would neither expand the time allotted to Appellants nor reduce the time allotted to Appellees.
3. On May 31, 2017, I communicated with Richard Mandel, counsel for Appellees, by

email. He represented that his clients did not consent to Copyright Scholars Amici participating in oral argument.

4. Copyright Scholar Amici intend to address issues raised in their brief filed with this Court on February 14, 2017 (Dkt. No. 108) and discussed numerous times in the briefs submitted by Appellees, Appellants, and *amici curiae* in support of Appellants.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: June 2, 2017

_____/s/ Jason M. Schultz_____

Jason M. Schultz

CERTIFICATE OF SERVICE

I hereby certify, that on June 2, 2017, a true and correct copy of the foregoing Motion of *Amici Curiae* Copyright Law Scholars to Participate in Oral Argument on Appeal was served on all counsel of record in this appeal via CM/ECF pursuant to Second Circuit Rule 25.1(h)(1)-(2).

Dated: June 2, 2017

_____/s/ Jason M. Schultz_____

Jason M. Schultz